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THE EFFECT OF WAR ON PUBLIC DEBTS AND ON TREATIES—THE CASE OF THE SPANISH INDEMNITY.

ON April 30, 1898, the Spanish Government issued a decree by which it was, among other things, declared:

"The war existing between Spain and the United States terminates the treaty of peace and friendship of the 27th October, 1795; the protocol of the 12th January, 1877, and all other agreements, compacts and conventions that have been in force up to the present between the two countries."

When, several weeks after its issuance, a copy of this decree, as published in the *London Gazette*, was received by the Department of State, it seems to have been assumed that the clause above quoted was to be understood in a very general sense, and was not intended to be taken literally, since there existed in the treaties between the two countries, not only stipulations which were permanent in their nature, but also stipulations which expressly referred to a state of war and could become operative only upon the happening of that event.

Not long afterwards, however, a rumor got abroad to the effect that the Spanish Government was contemplating the issuance of a decree of expulsion against citizens of the United States who might be within the Spanish dominions.

By Article XIII of the treaty of October 27, 1795, it was agreed that, if a war should break out between the two nations, one year after the declaration of war should be allowed to the merchants in the cities and towns where they should live for collecting and transporting their goods and merchandise. In view of the rumor referred to, the Department of State caused the attention of the Spanish Government to be drawn to this stipulation through the British Ambassador at Madrid. The Spanish Government replied that it considered all treaties between the two countries to be at an end, but offered to enter into a special convention for the provisional application during the war of the stipulation in question. The United States declined to accept this proposal on the ground that the stipulation, instead of being abrogated by the state of war, must be considered as finding therein its full force and effect. Here the correspondence closed. No decree of expulsion was issued; and, the claim of the Spanish Government to treat all stipulations between the two countries as at an end having been expressly avowed, it seems to have been thought useless to engage in further correspondence upon the subject at that time.

In the treaty of peace between the United States and Spain, signed at Paris December 10, 1898, there is no stipulation on the subject now under consideration. By Article VII the contracting parties "mutually relinquish all claims for indemnity," but this relinquishment is expressly restricted to claims "that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications." During the negotiation of the treaty, however, the American commissioners proposed an article by which all the treaties in existence between the two countries at the outbreak of the war were enumerated and declared to continue in force. This article was taken up for consideration at the conference held on the 8th of December. The President of the Spanish commission stated that the Spanish commissioners were unable to accept the article, but added: "Some of the treaties to which it referred were obsolete or related to conditions which no longer existed, and it would involve a more extended examination than the Joint Commission was in a position to give.

But this did not imply that the two governments might not take up the subject themselves." [1]

Among the treaties in force between the United States and Spain at the outbreak of the war, there was a convention signed at Madrid, February 17, 1834, under which an indemnity was provided for certain claims of citizens of the United States against the Spanish Government. The claims in question grew chiefly out of the seizure and confiscation of American vessels and cargoes for alleged violations of decrees issued by Spanish commanders during the war between Spain and her American colonies. British subjects had similar claims, for the enforcement of which their Government resorted to reprisals; and satisfaction was made by Spain in 1828, by the payment of 600,000 pounds sterling, in inscriptions redeemable within a fixed time. The United States forbore to press the claims of its citizens, except by negotiation, and they were not adjusted till February 17, 1834. By Article I of the convention signed at Madrid on that day, Spain agreed to pay the United States, in settlement of the claims, "the sum of twelve millions of rials vellon, in one or several inscriptions, as preferred by the Government of the United States, of perpetual rents, on the Great Book of the Consolidated Debt of Spain, bearing an interest of five per cent. per annum." The inscriptions were to be issued in conformity with a model annexed to the convention, and they, or the proceeds thereof, were to be distributed by the Government of the United States among the claimants entitled thereto, in such manner as it might deem just and equitable. The interest on the inscriptions was to be paid in Paris every six months.

The form of the inscription, as annexed to the treaty, is as follows:

No.
Cupon de
pesos fuertes en
renta pagadero en
de de
183
Cupon No. 10.

Renta perpetua de España,
pagadera en Paris
á razon de 5 p. o–o al año,
inscrita en el gran libro de la Deuda consolidada.

Esta Inscripcion se expide á consecuencia de un convenio celebrado en Madrid en de de entre S. M. Catolica la Reyna de España y los Estados Unidos de America, para el pago de las reclamaciones de los ciudodanos de dichos Estados.

[1] Ex. Doc. B, 55 Cong., 2 Sess., Part 2, p. 254.

INSCRIPCION NO.

Capital.		*Renta.*
Pesos fuertes	:	Pesos fuertes
ó sean francos.	:	ó sean francos.

El portador de la presente tiene derecho á una renta anual de pesos fuertes, ó sea de francos, pagaderos en Paris por semestres, en los dias de y de por los banqueros de España en aquella capital, á razon de 5 francos y 40 centimos por peso fuerte, con arreglo al Rl. decreto de 15 de Deciembre de 1825.

Consiguiente al mismo real decreto se destina cada aña á la amortizacion de esta renta uno por ciento de su valor nominal, á interes compuesto, cuyo importe sera empleado en su amortizacion periodica al curso corriente por dichos banqueros.—*Madrid,* de de *El Secretario de Estado y del Despacho de Hacienda.*

El Director de la Rl. Caja de Amortizacion.

This inscription, using for the purpose the English text of the treaty wherever applicable, may be translated as follows:

No.
Coupon of - hard pesos of interest payable on the - the - 183 -
Coupon No. 1.

Perpetual Rent of Spain
payable in Paris

at the rate of 5 per cent. per annum, inscribed in the great book of the consolidated Debt.

This inscription is issued in pursuance of a convention concluded at Madrid on the of , between Her Catholic Majesty, the Queen of Spain, and the United States of America, for the payment of the claims of the citizens of said States.

INSCRIPTION NO.

Principal.	Interest.
Hard pesos or francs.	Hard pesos or francs.

The bearer of this is entitled to an annual interest of hard pesos, or francs, payable in Paris semi-annually, on the day of and of , by the bankers of Spain in that capital, at the rate of 5 francs and 40 centimes for the hard peso, in accordance with the Royal decree of December 15, 1825.

Pursuant to the same royal decree there is set aside each year for the amortization of this rent one per cent. of its nominal value, at compound interest, which amount shall be employed in such periodical amortization at the current rate by said bankers.—Madrid, of of

The Secretary of State for the Treasury.

The Director of the Royal Bureau of Amortization.

The inscriptions, in proper form, with the coupons annexed, were delivered to the United States and deposited in Paris. On June 7, 1836, an act of Congress was approved, under which a commissioner was appointed for the purpose of deciding upon the merits of the various claims to an interest in the inscriptions. By the same act the Secretary of the Treasury was authorized to distribute in ratable proportions among persons in whose favor awards were to be made any money received into the Treasury under the international settlement, and to cause certificates to be made to awardees showing the proportions to which they were entitled. The act was duly carried into effect; and certificates were issued on which the interest on the "perpetual rents," as it was from time to time received, was distributed. The first four semi-annual installments of interest were duly paid; but, owing to lack of funds, payments were then suspended until 1841, when they were resumed at the rate of $60,000 a year till the arrears were discharged. Subsequently an arrangement was made, under which the sum of $28,500 was paid each year to the Department of State in full discharge of the annual interest. During the late war this payment was not made. The operation of the convention of 1834 was thus, in fact, suspended.

As the treaty of peace contained no stipulation on the subject, the question as to the continuing obligation of the debt, and of the convention by which it was guaranteed, remained to be determined by the two governments on the general principles of international law. We may therefore consider, with reference to those principles, the question of the effect of war, first, on public debts, and second on treaties.

By the testimony of publicists and the practice of nations, the principle is established that the obligation of a state for the payment of its debts is not affected by war even though such debts be held by citizens or subjects of the enemy. It is true that in certain early writers, who reiterate the stern rules of the law of Rome, sweeping generalizations may be found in which the right is asserted on the part of enemies to seize all property and confiscate all debts. The same writers, upon the same authority, assert the lawfulness of treating all subjects of the belligerent as enemies,

and as such of killing them, including women and children. These generalizations, even at the time when they were written, neither expressed nor purported to express the actual practice of nations, and it is superfluous to declare that the law of the present day is not to be found in them; for, with the change in the practice of nations, growing out of the advance in human thought, the law also has changed.

With the law of the present day as to private debts, we are not now concerned; but, as to the law touching public debts, the current of opinion is unvarying. Vattel, writing in the last century declared: "The state does not so much as touch *the sums which it owes to the enemy;* money lent to the public is everywhere exempt from confiscation and seizure.[1]"

This principle, says Phillimore, "is one which now may happily be said to have no gainsayers." [2]

The act of the King of Prussia, in 1752, in stopping, as an act of reprisal, the payment of interest due by him to English creditors on the Silesian loan is conspicuous not more by reason of its solitariness than by reason of the unanimity with which publicists have disapproved it. The payment of the interest was in fact resumed, but, while the question was still pending, the King of Prussia presented in justification of his course a Memorial. To this Memorial a famous Answer was prepared for the British Government by Sir George Lee, Judge of the Prerogative Court; Dr. Paul, the Advocate General; Sir Dudley Ryder, and Mr. Murray, afterward Lord Mansfield. In this Answer there is the following passage:

"It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to a private man. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honor, because a prince cannot be compelled, like other men, by a court of justice. So scrupulously did England, France and Spain adhere to this public faith, that even during the war they

[1] Laws of Nations, Book III, Ch. V., Sec. 78, Phila. Ed., 1858, p. 323.
[2] Int. Law, 2d ed., II, 148.

suffered no inquiry to be made whether any part of the public debt was due to the subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours." [1]

It will be observed that Spain is here referred to as one of the powers by whose conduct the inviolability of the public faith in respect of debts was, more than a century and a half ago, established.

Vattel described the British Answer as "an excellent bit of the law of nations" (un excellent morceau de droit des gens), while Montesquieu pronounced it "an answer without a rejoinder "(une réponse sans réplique).[2] It is commended by Twiss,[3] by Calvo,[4] and generally by other publicists.

Says Pradier-Fodéré: "States cannot confiscate to their profit that which they ought themselves to pay to subjects of the enemy, as by seizing the rents of the public debt. How, indeed, can it be admitted that a state may deprive of their due individuals who, under the guarantee of the law and the public faith, have confided to it their capital." [5]

Fiore asserts the same principle in almost the same words, and adds: "All that we could excuse in case of extreme necessity would be the suspension of payments during the war when the want of money rendered that measure indispensable and when the state would have no other means less ruinous of providing for the urgent necessity of the war. But even that expedient, which may be excusable if the Government afterwards makes the payments which were postponed at the conclusion of peace, would always be disastrous, because it would undermine the base of the economic life of the state—the public credit." [6]

Finally, without unnecessarily multiplying authorities on

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[1] Collectanea Juridica, 1, 154.

[2] Vattel, Book II, Ch. vii, sec. 84, n; Phillimore, 2nd ed., III, 34.

[3] Law of Nations, Rights and Duties in Time of War, London, 1863, pp. 110–114).

[4] Droit Int., 4th ed., iv. 55, sec. 1917.

[5] Traité de Droit International Public, Paris, 1894, vi., 740.

[6] Nouve au Droit International Public, Paris, 1886, III, 226, sec. 1392.

a point which is undisputed, we may quote from Hall, in view of his eminence among modern publicists, the following passage:

"Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation; but its different kinds are not protected by customs of equal authority, and although seizure would always be looked upon with extreme disfavor, it would be unsafe to declare that it is not generally within the bare rights of war.

"In one case a strictly obligatory usage of exemption has no doubt been established. Money lent by individuals to a state is not confiscated, and the interest payable upon it is not sequestrated. Whether this habit has been dictated by self-interest, or whether it was prompted by the consideration that money so lent was given 'upon the faith of an engagement of honor, because a prince cannot be compelled like other men in an adverse way by a Court of Justice,' it is now so confirmed that in the absence of an expressed reservation of the right to sequestrate the sums placed in its hands on going to war a state in borrowing must be understood to waive its right, and to contract that it will hold itself indebted to the lender and will pay interest on the sum borrowed under all circumstances."[1]

As to the effect of war upon treaties, we find in the publicists much contrariety of views; but it may be affirmed that the proposition that all treaties are extinguished or annuled by war is unsupported by authority at the present day. The misconception sometimes betrayed on the subject is due to the failure to note the narrow sense in which the word treaties has frequently been used in this relation. By a classification originating with the earlier publicists, and often repeated by their successors, treaties have been divided into two classes—*pacta transitoria*, or "transitory conventions," as the words have been unfortunately translated, and "treaties, properly so-called." In the former class were included international compacts by which a

[1] International Law, 4th ed., 1895, p. 453.

status was permanently established, or a right permanently vested; and, in the latter, compacts which looked to future action, and the execution of which presupposed the continuance of a state of peace between the contracting parties. In accordance with the distinction thus drawn, it was said that "treaties" were terminated by war, the word treaties being used in a limited technical sense. As a result of this double use of the term, controversies have occurred in which the abrogation of treaties by war has been affirmed as a universal principle on the one side and denied on the other, when in reality the word was used by the parties in different senses—by the one in its general and usual sense, and by the other in its special and restricted sense. For example, in the correspondence between John Quincy Adams and Lord Bathurst as to the question whether the "liberties" of American fishermen under the treaty of peace of 1783 were terminated by the war of 1812, Mr. Adams maintained that the "treaty of peace" "was not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is or can be considered as annulled by a subsequent war between the same parties."[1] Lord Bathurst replied: "To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties."[2] Nevertheless, his lordship in the same note declared: "The treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary character." And it may be assumed that if the treaty had been composed wholly of provisions deemed by his lordship to be of the former character, there would have been no controversy between him and Mr. Adams.

It is evident that in the arguments of these statesmen, as well as in the classification of treaties above referred to, there was a recognition of the principle, which is now received as fundamental, that the question whether the stipulations of a treaty are annulled by war depends upon

[1] Am. State Papers, For. Rel., IV., 352.
[2] *Id.*, 355.

their intrinsic character. If they relate to a right which the outbreak of war does not annul, the treaty itself remains unannulled.

Says Vattel: "The conventions, the treaties made with a nation, are broken or annulled by a war arising between the contracting parties, either because these compacts are grounded on a tacit supposition of the continuance of peace, or because each of the parties, being authorized to deprive his enemy of what belongs to him, takes from him those rights which he had conferred on him by treaty. Yet here we must except those treaties by which certain things are stipulated in case of a rupture—as, for instance, the length of time to be allowed on each side for the subjects of the other nation to quit the country—the neutrality of a town or province, insured by mutual consent, etc. Since, by treaties of this nature, we mean to provide for what shall be observed in case of a rupture, we renounce the right of cancelling them by a declaration of war."[1]

The renowned Swiss publicist thus not only denies that all treaties are broken or annulled by war, but he also declares that, where they are so affected, it is either because they are "grounded on a tacit supposition of the continuance of peace, or because each of the parties, being authorized to deprive his enemy of what belongs to him, takes from him those rights which he had conferred on him by treaty." It therefore cannot be doubted that, if the question as to a treaty by which a public debt is guaranteed had been specifically brought to his attention, he would have answered that such a treaty could not be considered as broken or annulled, since, by his own statement, as heretofore quoted, it appears that debts which the state owes to the enemy are "everywhere exempt from confiscation and seizure in case of war." And if, as in the present instance, the treaty had employed terms of perpetuity, he doubtless would have answered further that the contracting parties must be considered to have renounced their right to cancel it by a declaration of war.

The reasoning of Vattel has been repeated by many

[1] Vattel, Int. Law, Book III, Chap. X, sec. 175, Phila. ed., 1858, p. 371.

writers, and among others by Riquelme, who observes that war annuls "all the treaties which form the international legislation between the belligerent States," and that "the reason why these treaties perish by war, is because they are made with reference to peace, and, since it is lawful to take possession of whatever belongs to the enemy government, with greater reason it is proper to deprive it of the rights which grow out of the treaties."[1] The limitation by Riquelme in this passage of the general right of seizure to things belonging "to the enemy government" (cuanto pertenece al gobierno enemigo), will be noted.

Says Kent: "Where treaties contemplate a permanent arrangement of national rights, or which by their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war."[2] Wheaton expresses himself to the same effect.[3] Phillimore ascribes the errors of some writers in discussing the effect of war on treaties to their failure to distinguish between treaties temporary in their nature and treaties which contain "a final adjustment of a particular question, such as the fixing of a disputed boundary or ascertaining any contested right or property."[4] To questions of *private property*, he declares that the doctrine of the abrogation of treaties by war is "certainly not applicable." Rivier expresses the same opinion.[5] Hall, referring to the effect of war on "treaties with political objects, intended to set up a permanent state of things by an act done once for all," declares that compacts of this kind "must in all cases be regarded as continuing to impose obligations until they are either suspended by a fresh agreement or are invalidated by a sufficiently long adverse prescription;" and he further declares that where treaties, such as conventions to abolish the droit d'aubaine or regulate the acquisition and loss of nationality, may be considered as suspended during war, "the effects

[1] Elementos de Derecho Público Internacional, Madrid, 1849, I, 171.
[2] Comm., I, 177.
[3] Int. Law, Lawrence's ed., 1863, p. 460.
[4] Int. Law, 2d ed., III, 796.
[5] Principes du Droit des Gens, Paris, 1896, II, 137.

of acts previously done under their sanction must remain unaltered."[1]

Says Fiore: "As to treaties between belligerents, it cannot be admitted that the state of war extinguishes them all, but only such as are incompatible with that state."[2] Pillet truly declares that the view that the declaration of war annuls all treaties between the belligerents, "is no longer held by any one."[3]

While forbearing to cite the many other authorities to the same effect, we may quote from the great work of Calvo the following statement:

"What effect does the declaration of war produce on treaties which bind the contracting parties at the moment of the rupture of their pacific relations? Are these international acts all and wholly annulled in strict law, or yet do some of them fall, while others remain in force? The solution of these questions depends naturally upon the particular character of the engagements contracted. Thus all are agreed in admitting the rupture of conventional ties concluded expressly with a view to a state of peace, of those whose special object is to promote relations of harmony between nation and nation, such as treaties of amity, of alliance, and other acts of the same nature having a political character. As to customs and postal arrangements, conventions of navigation and commerce, and agreements relative to private interests, they are generally considered as suspended till the cessation of hostilities. By necessary consequence, it is a principle that every stipulation written with reference to war, as well as all clauses described as perpetual (*qualifiées de perpétuelles*), preserve in spite of the outbreak of hostilities their obligatory force so long as the belligerents have not, by common accord, annulled them or replaced them with others.[4]

It is not strange that principles thus universally accepted have been affirmed in the decisions of judicial courts. By Article VI of the Treaty of Peace between the United States and Great Britain of September 3, 1783, it

[1] Int. Law, 4th ed., p. 404.

[2] Nouveau Droit International Public, Paris, 1886, III, 83.

[3] Les Lois actuelles de la Guerre, Paris, 1898, p. 77, Sec. 43.

[4] Droit Int., 4th ed., IV, 65, Sec. 1931.

was declared that there should be "no future confiscations made, nor any prosecutions commenced against any person or persons for, or by reason of, the part he or they may have taken in the present war," and that no person should, "on that account, suffer any future loss or damage, either in his person, liberty or property." By Article IX of the treaty between the same powers of November 19, 1794, it was agreed "that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein, and may grant, sell or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens." By Article XXVIII, the first ten articles of the treaty were declared to be "permanent," while the subsequent articles, with one exception, were "limited in their duration to twelve years."

The question whether the stipulations of Article X were affected by the war of 1812 came before the Supreme Court of the United States in the case of the *Society for the Propagation of the Gospel*, a British association, against the *Town of New Haven;* and a decision was rendered to the effect that the stipulations remained in full force. The court, in the course of its opinion, said: "We think that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new or repugnant stipulations are made, they revive in their operations at the return of peace."[1]

Seven years later, in 1830, the same question was decided by the Court of Chancery in England, in the case of *Sutton* v. *Sutton*, in which a citizen of the United States claimed the right, under Article IX of the treaty of 1794, to hold and convey, in spite of his alienage, certain real estate in

[1] 8 Wheaton, 464, 494, A. D. 1823.

London. It appeared that in 1797 an act of Parliament (37 Geo. III, c. 97) was passed to carry the treaty into effect. Of this act, Sections 24 and 25 related to Article IX, and the last section, which was the 27th, declared: "This act shall continue in force so long as the said treaty between His Majesty and the United States of America shall continue in force and no longer." It was argued, both upon the strength of this section, and upon general principles, that, as the result of the war of 1812, the treaty of 1794 had ceased to be in force; that "it was impossible to suggest that the treaty was continuing in force in 1813," that is to say, during the existence of the war; that it "necessarily ceased with the commencement of the war;" that "the 37 G. 3, c. 97, could not continue in operation a moment longer without violating the plainest words of the act;" and that the word "permanent" was used, "not as synonymous with 'perpetual or everlasting,' but in opposition to a period expressly limited."

It is to be observed that counsel impliedly conceded that if the word "perpetual" had been employed in the article, there would have been no doubt as to its survival.

Sir John Leach, Master of the Rolls, decided that the article continued in full force at all times, saying:

"The relations which have subsisted between Great Britain and America, while they formed one empire, led to the introduction of the ninth article of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

"The Act of the 37 G. 3 gives full effect to this article of the treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article, that it was to be permanent, and independent of a state of peace or war, then the Act of Parliament must be held, in the twenty-fourth section, to declare this permanency; and

when a subsequent section provides that the act is to continue in force, so long as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but it is to be understood as referring to such provisions of the act only as would in their nature depend upon a state of peace."[1]

A decision was therefore rendered in favor of the right claimed by the American citizen.

Upon full consideration of the matter, it would be reasonable to conclude, were it not for the incident in regard to the question of expulsion, that the assertion in the Spanish decree, that the war terminated all treaties and conventions previously existing between the two countries, was inadvertent. But, however this may be, Spain did not in the end maintain that position. Frankly recognizing, to the fullest extent, her obligations under the convention of 1834, she paid in December, 1899, not only the interest for that year, but also the interest for 1898, and, in so doing, said: "In thus paying the two annuities, which on account of the late war had been suspended, the punctiliousness with which the Government of His Catholic Majesty attends to its international obligations will be clearly shown." By this act, and the explanation with which it was accompanied, both the debt and the convention were acknowledged to continue in full force, and an important precedent was established.

J. B. MOORE.

[1] 1 Russell & Mylne, 663.